



# Department of Employment Dispute Resolution

## **BEST PRACTICES <sup>1</sup>**

### **Statutory Mandates**

The Department of Employment Dispute Resolution (EDR) is mandated to establish a statewide mediation program to assist state employees in resolving workplace conflict. (Va. Code §2.2-1001 (2).) Further, each agency in the Executive Branch of state government is mandated to participate in the mediation program. (Va. Code §2.2-3000(B)(4).)

### **Preface**

These Best Practices are intended to perform three major functions: to serve as a guide for the conduct of EDR's Workplace Mediators ("mediator"); to inform mediation participants; and to promote confidence in mediation as a process for resolving workplace disputes in state government. These best practices draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They outline a set of standards to serve as a general framework for the practice of mediation. They are offered in the hope that they will serve an educational function and provide assistance to individuals and governmental agencies involved in mediation. The effort is a step in the ongoing development of EDR's workplace mediation program ("mediation program"), and a tool to assist practitioners in it -- a beginning, not an end.

Mediation is a process in which an impartial third party -- a mediator -- facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the participants on their mutual interests, and seeks creative problem-solving to enable the participants to reach their own agreement. These standards give meaning to this definition of mediation.

EDR's mediation program is designed and operated to be consistent with the statutory and constitutional rights of state employees. Mediation is accessible to employees in all branches of state government (executive, legislative and judicial). Mediation is not intended to restrict management from taking appropriate actions to correct an employee's behavior or to address performance issues.

---

<sup>1</sup> Adapted from "The Model Standards of Conduct for Mediators" approved by the American Arbitration Association, the Litigation Section and Dispute Resolution Section of the American Bar Association and the Society of Professionals in Dispute Resolution.

**I. Assessing the Appropriateness of the Mediation: EDR conducts initial and on-going assessments of all requests for mediation.**

Prior to agreeing to mediate, EDR's Mediation Staff discusses the request to mediate with the Agency Workplace Mediation Coordinator and determines whether the request is appropriate. Further, once EDR agrees to mediate, the mediator continues the assessment throughout the process to determine that:

- (a) mediation is an appropriate process for the participants;
- (b) each person is able to participate effectively within the context of the mediation process; and
- (c) each person is willing to enter and participate in the process in good faith.

If, in the judgement of EDR or the mediators, any of the conditions specified in (a) through (c) is not met, the process may be suspended or terminated.

**II. Self-Determination: A mediator recognizes that mediation is based on the principle of self-determination of the participants.**

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the participants to reach a voluntary, uncoerced agreement. Any participant may withdraw from mediation at any time.

**COMMENTS:**

- The mediator may provide information about the process, raise issues, and help participants explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Participants are given the opportunity to consider all proposed options.
- A mediator cannot personally ensure that each participant has made a fully informed choice to reach a particular agreement, but the mediator should make the participants aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

**III. Impartiality: A mediator conducts the mediation in an impartial manner.**

The concept of mediator impartiality is central to the mediation process. A mediator will mediate only those matters in which s/he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS:

- A mediator avoids conduct that gives the appearance of partiality toward one of the participants. The quality of the mediation process is enhanced when the participants have confidence in the impartiality of the mediator.
- EDR appoints mediators and makes reasonable efforts to ensure that each mediator may serve impartially.
- A mediator should guard against partiality or prejudice based on the participants' personal characteristics, background or performance at the mediation.

**IV. Conflicts of Interest: A mediator discloses all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator declines to mediate unless all participants choose to retain the mediator. The need to protect against conflicts of interest also governs the conduct that occurs during and after the mediation.**

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all participants agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all participants, a mediator shall not subsequently establish a professional relationship with one of the participants in a related matter, or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process.

COMMENTS:

- A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations that maintain rosters of qualified professionals.

- Potential conflicts of interest may arise between agency representatives and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment is to the participants and the process. Pressure from outside the mediation process should never influence the mediator to persuade participants to reach any particular outcome.

**V. Competence: A mediator mediates only those conflicts for which s/he has the necessary qualifications to satisfy the reasonable expectations of the participants.**

The participants must be able to rely on the qualifications of mediators assigned by EDR. Training and experience in mediation are necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives participants and the public the expectation that s/he has the competency to mediate effectively.

**COMMENTS:**

- Mediators should be ready and willing to share information with the participants regarding their relevant training, education and experience.
- The requirements for serving as a mediator will be made public and available to interested persons.
- Mediators will complete an initial application and, upon a successful application review, receive official appointment to the list of EDR's Workplace Mediators. Once appointed, mediators will update information on the application as it becomes available.
- EDR shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.
- EDR shall provide ongoing education for mediators and review mediator qualifications on an ongoing basis.
- Mediators shall mediate at least one EDR mediation annually, if asked, and participate in at least one annual update training session to maintain and hone their mediation skills.

**VI. Confidentiality: A mediator maintains the reasonable expectations of the participants with regard to confidentiality.**

The mediator meets the reasonable expectations of the participants with regard to confidentiality. The participants' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a participant expects to be confidential unless given permission by all participants or unless required by law or the Workplace Mediation Guidelines.

**COMMENTS:**

- At the beginning of each mediation session, the mediator will discuss with the participants all confidentiality provisions in the “Consent to Mediate” (Appendix F). Additionally, since the participants' expectations regarding confidentiality are important, the mediator should discuss these expectations with the participants before the signing of the “Consent to Mediate”.
- If the mediator holds private sessions with a participant (i.e. caucus), the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
- In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the participants acted in the mediation process, the merits of the case, or any particulars leading to the point of agreement. The mediator must report to EDR whether participants appeared at a scheduled mediation.
- Confidentiality should not be construed to limit or prohibit the effective monitoring, research or evaluation of mediation programs by responsible persons. EDR’s Workplace Mediation Team Leader and other EDR personnel are permitted to access statistical data and individual case files, observe live mediations, and review interviews with participants and the Agency Workplace Mediation Coordinators. Agency Workplace Mediation Coordinators are permitted to obtain and review written agreements resulting from an EDR mediation. (See *Workplace Mediation Guidelines* for more information.)

**VII. Quality of the process: A mediator conducts the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.**

A mediator works to ensure a quality process and to encourage mutual respect among the participants. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each person in the mediation to participate in the discussions. The participants decide when and under what conditions they will reach an agreement or terminate mediation.

**COMMENTS:**

- A mediator may agree to mediate only when s/he is prepared to commit the attention essential to an effective mediation.
- Mediators only accept cases when they can satisfy the reasonable expectations of the participants concerning the timing of the process and the level of expertise required. A mediator should not allow a mediation to be unduly delayed by the participants.
- The presence or absence of persons at mediation depends on the agreement of the participants and mediator. The participants and mediator may agree that others may be excluded from particular sessions or from the entire mediation.
- The primary purpose of a mediator is to facilitate the participants' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that participants seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator, who undertakes, at the request of the participants, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.
- A mediator withdraws from mediation when incapable of serving or when unable to remain impartial.
- A mediator informs the participants after consultation with EDR's Workplace Mediation Team Leader, if, in the mediator's judgement the integrity of the process has been compromised by,

for example, the inability or unwillingness of a participant to participate meaningfully, gross inequality of bargaining power or ability, or gross unfairness resulting from nondisclosure or fraud by a participant. The mediator discontinues the mediation in such circumstances, but does not violate the obligation of confidentiality.

- A mediator withdraws from mediation or postpones a session if the mediation is being used to further illegal conduct, or if a person is unable to participate due to drug, alcohol, or other physical or mental incapacity.
- Mediators should not permit their behavior in the mediation process to be guided by a desire for a high resolution rate.

**VIII. Agreement: The mediator has no vested interest in the outcome of the mediation; therefore the mediator encourages the participants to develop their own solutions to the conflict. The mediator does not recommend particular solutions to any of the issues in dispute nor persuade the participants to reach an agreement on any or all of the issues being mediated.**

Prior to the participants entering into a written mediated agreement, the mediator will determine that:

- (a) the participants have considered all that the agreement involves and the possible ramifications of the agreement;
- (b) the participants have considered the interests of other persons who are affected by the agreement; and
- (c) the participants have entered into the agreement voluntarily.

**COMMENTS:**

- The mediator encourages the participants to have any draft written agreement reviewed by a representative or another individual of choice prior to signing.
- The mediator helps parties to consider, as part of the written agreement, a plan for reviewing the agreement regularly in the future to identify any further behaviors or actions that could strengthen the work relationship.

**IX. Advertising and Solicitation: EDR's statewide mediation program communicates truthfully to its customers, potential customers and the public about its services.**

Advertising or any other communication by EDR concerning services offered or regarding the education, training, and expertise of its mediators will be truthful. EDR and mediators refrain from promises and guarantees of results.

**COMMENTS:**

- It is imperative that communication by EDR educates and instills confidence in the process.
- EDR communications may make reference to meeting state, national, or other qualifications only if the entity referred to has a procedure for qualifying mediation providers and EDR has been duly granted the requisite status.

**X. Fees: EDR fully discloses and explains the basis of any compensation, fees, and charges to EDR customers.**

EDR customers should be provided sufficient information about any fees at the outset of a mediation to determine if they wish to retain the services of a mediator. Generally in EDR mediations, only mediator mileage fees are charged to the requesting agency. Occasionally, EDR may get a request that can only be met by a private sector mediator who charges for his or her service. If a mediator charges fees, the fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

**COMMENTS:**

- A mediator who withdraws from mediation should return any unearned fee to the payer.
- A mediator should not enter into a fee agreement that is contingent upon the result of the mediation.
- Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
- A mediator should not accept a fee for referral of a matter to another mediator or to any other person.



**XI. Obligation to the mediation process: Mediators have a duty to improve the practice of mediation.**

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

**COMMENTS:**

- Mediators are encouraged to contact EDR's Mediation Staff for consultation at any point during the mediation process.
- Mediators must offer the parties the opportunity to complete the "Participant Evaluation of Mediators and the Mediation Process" and must complete the "Mediator Report" at the conclusion of each mediation. EDR will use this information, as well as information gathered at a six-month follow-up interview, to continuously improve its mediation program. (See *Workplace Mediation Guidelines* for more information.)